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In The

Supreme Court of the United States

OCTOBER TERM, 1958

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,

vs.

HONORABLE THOMAS P. THORNTON, Judge of the United States District Court for the Eastern District of Michigan, Southern Division,
Respondent.

No. 148

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Honorable Thomas P. Thornton, United States District Judge, Respondent herein, respectfully requests that the Petition for Writ of Certiorari heretofore filed in this matter be denied.

QUESTION PRESENTED

Whether the District Judge so clearly abused his discretion as to require the issuance of a writ of mandamus against him when he denied defendant's motion for change of venue pursuant to 28 U.S.C. Section 1404(a),[1] finding as

[1] Set forth in full in the Appendix to the petition filed herein, at page 14a, and hereinafter cited as "Section 1404(a)."

facts that the convenience of parties and witnesses would not be better served by the requested transfer and that defendant had shown no such prejudice against it on the part of potential jurors as to require the transfer in the interest of justice.

STATEMENT OF THE CASE

On February 12, 1958, Michigan Consolidated Gas Company (Consolidated) filed its complaint (R. 28)[2] in this cause in the United States District Court for the Eastern District of Michigan, Southern Division, at Detroit. Consolidated seeks to recover damages from the defendant, Panhandle Eastern Pipe Line Company (Panhandle) by reason of Panhandle's refusal to sell natural gas to Consolidated in violation of the terms of Panhandle's tariff and in violation of the Natural Gas Act.

Panhandle has filed no answer, but on March 17, 1958, it filed its motion for change of venue (R. 36) pursuant to Section 1404(a), alleging that for the convenience of the parties and witnesses and in the interest of justice, the cause should be transferred to the United States District Court for the Western District of Missouri, Western Division, at Kansas City. Consolidated filed an answer to Panhandle's motion (R. 56). Affidavits (R. 39, 46, 50, 52, 61), an exhibit (R. Vol. II) and briefs were filed (R. 64, 75, 140) and oral argument held (R. 100).

In the briefs filed in its behalf (R. 80-86) and in oral argument (R. 101-102), Panhandle contended that it would be more convenient for it to try the case in Kansas City because it would otherwise be required to transport witnesses and records from Kansas City to Detroit. Consolidated argued that it would suffer equal or greater inconvenience in transporting witnesses and records from

[2] "R." references are to the printed transcript of the record, filed with the petition.

Detroit to Kansas City if the motion were granted (R. 65-72, 124-128).

Panhandle also filed an exhibit (R. Vol. II) consisting of 123 pages of reproduced clippings from newspapers published in Detroit and vicinity between 1952 and 1958. Based on this exhibit its counsel argued to the District Court as follows:

> "I say to your Honor with great sincerity that we feel that, on the record made here, Panhandle has shown that it cannot obtain a fair jury trial in this jurisdiction." (R. 103)

The Opinion of the District Court

The District Judge considered the motion, the pleadings, the affidavits and exhibit, the argument before the Court and the briefs filed by the parties, and on April 6, 1959, filed his Memorandum Opinion (App. 5a).[3] The opinion dealt first with the question of convenience of parties and witnesses and stated (App. 6a-8a):

> "Plaintiff is a Michigan corporation with its principal place of business in this district, and with its entire business operations within the state of Michigan. Its offices, officials and business records are all kept and maintained here. There is no aspect of abnormality in the choice of forum in this instance by the plaintiff. It is as natural as one can imagine. Defendant advances many of the same reasons, practicality-wise, for desiring the transfer to its base of operations as we have set forth in pointing up the normalcy of plaintiff's choice of forum. ***In relation to the convenience of parties and to the convenience of witnesses, it is the Court's opinion that a transfer is not proper. If the convenience of defendant would be better served by such transfer it would be proportionally disserved from the viewpoint of plaintiff. It might also be noted that the area

[3] "App." references are to the Appendix following the petition filed herein

with which the lawsuit is concerned is this area, not Kansas City. The damages here sought for failure to sell to Consolidated relate to natural gas that allegedly should have been available for consumption in this area, not in Kansas City. Therefore, by all traditional standards of 'locus' (place where the tort occurred, place where contract was made or was to be performed) this action is properly in Michigan. From the pleadings, affidavits, exhibits and argument before the Court, the Court is of the opinion that the convenience of the parties and the convenience of the witnesses would not be better served by the requested transfer."

The District Judge then turned to Panhandle's claim that it could not obtain a fair jury trial in the Eastern District of Michigan, Southern Division, and that the interest of justice therefore required a change of venue. Considering the newspaper clippings exhibit upon which this claim was based, the Court stated (App. 9a-10a):

"A reading of this exhibit followed by some reflection on it does not present quite the picture outlined so graphically by defendant's counsel. The reportorial writings do no more than indicate the views of the parties involved in each of the particular controversies as they have arisen over the last seven or eight years. The matters involved in the newspaper reports are not related to the instant cause of action in any way that would give readers a predisposition on any issue here present. ***

"The over-all picture, as gleaned by the Court from its viewing of the clippings Exhibit, is not one that redounds to the prejudice of defendant. There are uncomplimentary remarks about each participant in the various incidents related in the clippings. To say that the appearance of these articles in the local newspapers over a period of years necessarily, or even possibly, would produce a population of citizens in the affected area who are all personally prejudiced against defendant because of an indoc-

trinated belief that Panhandle's success in this litigation would mean personal doom to them, is to indulge in fantasy. This is not the 'interest of justice' concept that was intended to be furthered by §1404(a). It should be noted that the population of metropolitan Detroit, as of the City's 1956 estimate, is 3,670,000; that the Eastern District, Southern Division, embraces 11 counties, with a total population of 4,162,700 (July, 1957). Many of the counties are not served by plaintiff. The population of such counties would, therefore, be in no position to be personally concerned with the price charged by Consolidated for consumers' gas. There is no prohibition against calling jurors from such counties."

The Opinion of the Court of Appeals

Following the entry of the order of the District Court denying the motion (App. 11a), Panhandle filed in the Court of Appeals its petition for a writ of mandamus (R. 1) directing the District Judge to vacate said order and further directing him to enter an order transferring the cause to Kansas City. In its petition Panhandle again argued that it "cannot obtain a fair jury trial before an impartial and unbiased jury in the District Court for the Eastern District of Michigan" (R. 4); and argued that it had made "a preponderant showing that the convenience of parties and witnesses will be better served by a trial of this case in the Western District of Missouri, Western Division, than in the Eastern District of Michigan" (R. 6). It alleged a number of different respects in which it contended that the District Court "abused its discretion and committed error" (R. 8-11).

The Court of Appeals reviewed Panhandle's arguments and noted that "these contentions had the consideration of the District Judge and were discussed in his Memorandum Opinion in connection with the order herein complained of."

(App. 3a). The Court of Appeals cited the opinion of this Court in *Ex parte Fahey*, 332 U. S. 258, to the point that mandamus is a "drastic and extraordinary" remedy which should not be used as a substitute for an appeal, and that as an extraordinary remedy it should be "reserved for really extraordinary causes." (App. 3a).

The Court of Appeals stated that it had "recently considered the use of a writ of mandamus to review a ruling of the District Court on a motion for change of venue under Sec. 1404(a)" in *Lemon v. Druffel*, 253 F. 2d 680, C. A. 6th, cert. denied 358 U.S. 821 (App. 4a). The Court indicated that "in that case we discussed the question at some length and pointed out that although the Court has the power to review by mandamus proceedings a ruling under Sec. 1404(a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion of usurpation of judicial power."

The Court of Appeals concluded (App. 4a):

> "In the present case we are of the opinion that there is no such clear abuse of discretion or usurpation of judicial power in the order of the District Judge as to present the really extraordinary cause in which a writ of mandamus should be used for the purpose of reviewing at the present time the correctness of an interlocutory ruling. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383; *Ex parte Fahey*, 332 U.S. 258."

ARGUMENT

The only question actually presented for review is whether the District Judge so abused his discretion as to require the issuance of a writ of mandamus directing him to vacate his order. The Court of Appeals found no such abuse of discretion. Its ruling was correct.

The questions *argued* by petitioner *are not presented* by the opinions and orders below. The opinion of the Court of Appeals does not rule or even suggest that 28 U.S.C. Section 1292(b)[1] is the exclusive method of review of orders on motions for change of venue, or that it limits the availability of mandamus proceedings. Petitioner's claim that the District Judge held that Section 1404(a) does not comprehend the right to a fair jury trial is refuted by the fact that the major portion of the opinion of the District Judge was devoted to a careful consideration of the merits of Petitioner's assertion that it could not obtain a fair jury trial in the Eastern District of Michigan.

Petitioner asks this Court to bring before it for review hypothetical questions not presented by the record. Petitioner has made no showing of special or important reasons for review of the decision of the Court of Appeals which would justify the issuance of a writ of certiorari here. The petition should be denied.

I. The District Judge Did Not Abuse His Discretion

Contrary to the contentions of Petitioner, the only question actually presented by the record before this Court is whether the District Judge clearly abused his discretion in denying Petitioner's motion for change of venue.

What Petitioner really seeks is review of the merits of its claims that the convenience of the parties and witnesses require a change of venue and that it cannot obtain a fair

[1] Set forth in full in the Appendix to the petition filed herein at pp. 13a and 14a and hereinafter cited as "Section 1292(b)."

jury trial in the Eastern District of Michigan. Since these matters were clearly within the discretion of the District Court, its decision should not be disturbed unless that discretion was abused. The Court of Appeals reviewed the proceedings in the District Court and held that there had been no abuse of discretion which would justify the issuance of a writ of mandamus against the District Judge. Without further reviewing the facts, Respondent submits that the record clearly justifies the decisions below.

II. Petitioner's "Questions Presented" Are Not Presented By The Opinions and Orders Below

Petitioner seeks to conjure up conflict between the interlocutory appeal procedure newly provided by Section 1292(b) and the writ of mandamus of 28 U.S.C. Section 1651(a).[5] It also purports to find conflict between the decision of the Court of Appeals here and a ruling of the Court of Appeals for the Fifth Circuit (P. 8-11).[6]

A. The Court of Appeals did not hold that Section 1292(b) "destroyed the power of review by mandamus"

In a patent misinterpretation of the opinion of the Court of Appeals, the Petitioner states:

> "The only conclusion which can be drawn from the court's holding is that it believes review of orders on motions for transfer, if available at all, can only be obtained under Section 1292(b) and not under Section 1651(a). *** (P. 8)
>
> "***the Court of Appeals here has held that Section 1292(b) has destroyed the hitherto unquestioned power of review of such orders by mandamus." (P 11)

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[5] Set forth in full at App. 14a.

[6] "P." references are to the petition filed herein.

The only reference by the Court of Appeals to Section 1292(b), is made near the end of a paragraph in which it discusses generally the use of mandamus proceedings to review interlocutory orders of the District Court and cites *Allstate Insurance Company v. United States District Court, etc.*, 264 F. 2d 38, C.A. 6th, along with other authorities, as consistent with the following ruling of this Court in *Ex parte Fahey*, 332 U.S. 258:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. *** We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for really extraordinary causes."

The Court then refers to Section 1292(b), saying:

> "In the *Allstate Insurance Company* case we also pointed out that the petitioner had made no showing of having sought relief under *** Section 1292(b) ***."

The *Allstate Insurance Company* case involved a petition for a writ of mandamus to vacate an order of a District Judge refusing to dismiss a cross-complaint for alleged lack of jurisdiction of the subject matter. In that case, as well as in the case at bar, the Court of Appeals relied upon the foregoing passage from *Ex parte Fahey*, supra. It did observe, as aforesaid, that the petitioner had made no showing of having sought relief under Section 1292(b). But the *ruling* in the *Allstate* case was as follows:

> "We find no such extraordinary circumstances here existing which would justify the issuance of the writ of mandamus sought by petitioner. *Massey-Harris-Ferguson, Ltd. v. Boyd*, supra." 264 F. 2d 39, 40.

In *Allstate*, as here, the Court of Appeals relied upon the rulings of this Court in *Ex parte Fahey*, 332 U. S. 258, and *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, to the effect

that mandamus is an extraordinary remedy reserved for extraordinary causes.

We agree with Petitioner that the determination of its motion for change of venue involved only issues of fact, i.e. (1) balancing of convenience of parties and witnesses, and (2) whether an impartial jury could be empaneled out of the eleven counties comprising the Eastern District of Michigan, and that therefore the order of the District Court denying its motion was not within the purview of Section 1292(b).[7] (See P. 9-10). Had Petitioner so argued to the Court of Appeals, there would have been no occasion for the Court's comment on Section 1292(b). It could have been omitted without affecting the substance of the opinion.

But that is not the basis upon which this Petitioner presented its petition for a writ of mandamus to the Court of Appeals. On pages 5 and 6 of the petition filed in this Court there are recited the four assignments of alleged error upon which the petition for writ of mandamus was based. Each of the four separately enumerated assignments is alleged by the petition to be an erroneous ruling upon a controlling question of law. The first two of such assignments are labeled by the petition as erroneous rulings of law; the other two are inherently such.

Those allegations were a complete distortion of the ruling of the District Court but they were the basis for the petition for writ of mandamus. If true, the allegations might have brought the order of the District Court within the purview of Section 1292(b). In view of such allegations, it was certainly normal and proper for the Court of Appeals to comment that Petitioner had failed to seek the remedy provided by Section 1292(b) before resorting to the extraordinary remedy of mandamus.

Furthermore, and in direct contradiction of Petitioner's

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[7] Sec. 1292(b). "When a district judge * * * shall be of the opinion that such order involves a *controlling question of law* * * *"

statement (P. 11) that "the Court of Appeals here has held that Section 1292(b) has destroyed the hitherto unquestioned power of review of such orders by mandamus," the Court of Appeals cited its own recent decision in *Lemon v. Druffel*, 253 F. 2d 680, C.A. 6th, cert. denied 358 U. S. 821, and said:

> "In that case we discussed the question at some length and pointed out that although the court has the power to review by mandamus proceedings a ruling under Section 1404(a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion or usurpation of judicial power." (App. 4a)

B. The decisions of the Courts of Appeals for the Fifth and Sixth Circuits are not in conflict

A brief comment is in order with respect to the conflict alleged by Petitioner (P. 11) between the holding of the Fifth Circuit Court of Appeals in *Ex parte Deepwater Exploration Co.*, 260 F. 2d 546, and the ruling of the Court of Appeals for the Sixth Circuit in the instant case.

The rules of the Court of Appeals for the Fifth Circuit require a motion for leave to file a petition for writ of mandamus to be presented and granted by the Court of Appeals before the petition itself is filed. In the *Deepwater Exploration* case, the Court held that it "should not pass upon the said motion for leave so long as it is not clear and undisputable that there is no adequate remedy by appeal." 260 F. 2d 547. Accordingly, the Court postponed consideration of the motion for leave until the prospective petitioner had attempted to secure the certificate of the District Court provided by Section 1292(b). When the District Court refused its certificate (167 F. Supp. 185), the Court of Appeals granted the petitioner's motion for leave to file petition for writ of mandamus. However, it does not appear what action was taken in the *Deepwater Exploration* case

after consideration of the petition on the merits. See also *Watkins v. Watkins*, 260 F. 2d 548, C.A. 5th.

In the Court of Appeals for the Sixth Circuit the motion for leave to file the petition is not required. Title 28 U.S.C., Rules of Court of Appeals for Sixth Circuit, Rule 29.[8] Here Petitioner was permitted to file its petition and the petition was forthwith considered by the Court of Appeals and denied on its merits. The Court of Appeals simply noted in the course of its opinion (justifiably in view of the form of the petition) that the Petitioner had not previously sought relief under Section 1292(b).

While there are procedural differences between the two Circuits, there is no conflict between the rulings of the two Courts of Appeals. In both cases the Court *did* consider the petition for writ of mandamus on its merits. See also the ruling of the Ninth Circuit Court of Appeals in *Anderson v. McLaughlin*, 263 F. 2d 723, 725.

C. The Court of Appeals confirmed and followed the standards governing writs of mandamus announced by it in Lemon v. Druffel

In the second section of its argument (P. 11-15), the Petitioner seeks to confuse the standards applied by the Court of Appeals in denying the writ of mandamus. However, the Petitioner states with apparent approval:

> "Had the petitioner unsuccessfully requested the district court to make findings under Section 1292(b), the Court of Appeals presumably would permit review by mandamus and apply the standards

[8] Rule 29: "* * * Sec. 2. A party desiring to secure a writ of mandamus * * * shall file an original and three typewritten copies of his petition therefor setting forth the facts upon which he claims to be entitled to the writ which shall be sworn to and may be accompanied by such brief or memorandum as he may desire to submit. * * *

"Sec. 3. If the court is of opinion that the facts set forth in the petition justify a hearing, an order to show cause will be entered, returnable as promptly as the situation permits; if of contrary opinion, an order will be entered denying the petition."

enumerated in *Lemon v. Druffel*, 253 F. 2d 680." (P. 12)

That is, of course, precisely what the Court of Appeals did in the instant case. It permitted review by mandamus. It recited the standards enumerated in *Lemon v. Druffel* as follows:

> "In that case we discussed the question at some length and pointed out that although the court has the power to review by mandamus proceedings a ruling under Section 1404(a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion or usurpation of judicial power." (App. 4a)

And finally the Court of Appeals applied those standards and denied the petition for writ of mandamus on its merits, stating:

> "In the present case we are of the opinion that there is no such clear abuse of discretion or usurpation of judicial power in the order of the District Judge as to present the really extraordinary cause in which a writ of mandamus should be used for the purpose of reviewing at the present time the correctness of the interlocutory ruling." (App. 4a)

III. The District Court Properly Ruled That Petitioner Can Obtain A Fair Jury Trial In The Eastern District of Michigan

In the third section of its argument (P. 15-18), Petitioner deals with the following question which it claims is presented for review:

> "(3) Whether the right to a fair jury trial is comprehended within the standard 'interest of justice' as used in 28 U. S. C. § 1404(a) so that a district judge must consider an asserted denial of that right in ruling on a motion for transfer." (P. 2)

In view of the fact that the District Judge did devote the major portion of his opinion to careful consideration of the merits of Petitioner's assertion that it could not obtain a fair jury trial in the Eastern District of Michigan, the imaginary nature of Petitioner's "Question Presented" is readily apparent.

What Petitioner actually seeks in this section of its argument is review of the merits of its claim that it cannot obtain a fair jury trial in the guise of a request for interpretation of Section 1404(a) (P. 15-16). Petitioner asks this Court to rule on the quantum and quality of prejudice which must be shown on the part of potential jurors to require a change of venue in the interest of justice (P. 18). Specifically, Petitioner suggests that "the Federal Courts should be quick to transfer a case where there is the slightest possibility that such instinct prejudice may influence the outcome" (P. 18). However, the District Judge found that Petitioner's showing did not even meet the standard for which it contends. In the District Judge's opinion, he stated:

> "The over-all picture *** is not one that redounds to the prejudice of defendant. *** In the event it should develop that the *possibility* of prejudice existed, the Court could easily consider empanelling jurors from areas certain to be immune from contamination by the local press, ***." (Emphasis supplied) (App. 9a)

The District Judge found as matters of fact that no prejudice had been shown presently to exist and that if the "*possibility of prejudice*" should later develop, adequate measures could be taken in the Eastern District of Michigan to insure Petitioner a fair jury trial. The Court of Appeals held that in so finding the District Judge had not abused his discretion.

The decisions below do not present important, unsettled questions of federal law. They present only the question

whether the District Judge abused his discretion in denying the Petitioner's motion. The petition here presents no reason for this Court to review or disturb the ruling of the Court of Appeals.

Summary

Petitioner has made no showing of clear abuse of discretion on the part of the District Court or on the part of the Court of Appeals. No conflict has been shown between the decision of the Court of Appeals here and the decision of other Courts of Appeals on the same subject matter. The questions of law which Petitioner has argued are not found in the record before this Court. The record here discloses no special or important reasons calling for the granting of review on writ of certiorari.

CONCLUSION

Wherefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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